



CITY of WILMINGTON North Carolina

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10/17/2007

City Council
City Hall
Wilmington, North Carolina 28401

Dear Mayor and Councilmembers:

Attached for your consideration is a Resolution authorizing the City to enter into a municipal agreement with the North Carolina Department of Transportation (NCDOT). The agreement allows for the upgrade and expansion of the existing computerized traffic signal system under Project U-5017 (08TS10-Signal System Upgrade).

Under the agreement, the NCDOT would enter into a contract for the preparation of the plans, specifications, and estimate for the design and construction of the upgrade and expansion. Although the NCDOT plans to construct the project, the City agrees to participate in the costs. The City's contribution to the project will be funded through the Transportation Bond.

Upgrading the computerized traffic signal system, which will help us provide better services, is consistent with the City's Strategic Plan.

Passage of the attached Resolution is recommended.

Respectfully submitted,

Sterling B. Cheatham
City Manager

Resolution



City Council
City of Wilmington
North Carolina

Introduced By: Sterling B. Cheatham, City Manager

Date: 10/17/2007

**Resolution Authorizing a Municipal Agreement with the North Carolina
Department of Transportation for the Upgrade and Expansion of the
Existing Computerized Traffic Signal System Under Project U-5017**

LEGISLATIVE INTENT/PURPOSE:

WHEREAS, the North Carolina Department of Transportation and City of Wilmington propose to make certain traffic control improvements under Project U-5017 within and around the Municipality, said project to consist of the design and construction for the modernization/rehabilitation and expansion of the existing computerized traffic signal system; and,

WHEREAS, the North Carolina Department of Transportation proposes to enter into a contract for the preparation of the plans, specifications, and estimate for the design and construction of said project; and

WHEREAS, the North Carolina Department of Transportation has plans to construct the project in accordance with the project plans; and

WHEREAS, the City of Wilmington has agreed to participate in the costs for said project in accordance with the terms denoted in the Traffic Agreement, funded within Project 08TS10, said Agreement presented herewith this day.

THEREFORE, BE IT RESOLVED:

THAT Project U-5017, New Hanover County, is hereby formally approved by the City Council of the City of Wilmington and that the Mayor is hereby empowered to sign and execute the Municipal Agreement with the North Carolina Department of Transportation.

Bill Saffo, Mayor

Adopted at a _____ meeting
on _____, 2007.

ATTEST:

City Clerk

APPROVED AS TO
AVAILABILITY OF FUNDS:

Finance Director

NORTH CAROLINA
NEW HANOVER

9/26/07

NORTH CAROLINA DEPARTMENT OF
TRANSPORTATION

TRAFFIC AGREEMENT

AND

PROJECT: U-5017

CITY OF WILMINGTON

THIS TRAFFIC AGREEMENT is made and entered into on the last date executed below, by and between the North Carolina Department of Transportation, an agency of the State of North Carolina, hereinafter referred to as the "Department" and the City of Wilmington, hereinafter referred to as the "Municipality".

W I T N E S S E T H:

WHEREAS, the Department and Municipality propose to make certain traffic control improvements within and around the Municipality; said project to consist of the design and construction for the modernization/rehabilitation and expansion of the existing computerized traffic signal system in New Hanover County, in the City of Wilmington; and,

WHEREAS, the Department and the Municipality are authorized by the following legislation: General Statutes of North Carolina, Section 136-66.1, Section 160A-296 and 297, Section 136-18, and Section 20-169, to provide adequate traffic operation controls and control devices for the safe and efficient utilization of highways; and,

WHEREAS, the Department and the Municipality, recognizing the mutual benefit to be derived from the modernization/rehabilitation and expansion of the existing computerized traffic signal system have mutually agreed to participate in the cost of the design and construction of said modernization/rehabilitation and expansion project, subject to the conditions hereinafter set forth:

NOW, THEREFORE, the parties hereto, each in consideration of the promises and undertakings of the other as herein provided, do hereby covenant and agree, each with the other as follows:

1. The Department, or its agent, shall be responsible for the preparation of the plans, specifications and estimates required for the modernization/rehabilitation and expansion of the Department's and Municipality's existing computerized traffic signal system ("Project"). The modernization/rehabilitation and expansion project shall contain new state-of-the-art equipment and shall include, but not be limited to:

- Type 2070L cabinet and controller assemblies
- Fiber optic communications media
- CCTV equipment at selected locations
- New system loops for traffic responsive operation
- Pedestrian countdown displays at locations with existing pedestrian signals

Additional fiber optic cable and hardware may be installed at the request of the Municipality in accordance with the provisions of "Exhibit A". The finalized documents shall be in accordance with Departmental standards and specifications, and shall be suitable in form and content for letting the project. Preparation of the plans, specifications and estimate, should not exceed fifteen (15) months. The Municipality agrees that the development of the plans and specifications is an eligible project expense and subject to recovery by the Department.

2. If the Municipality causes the professional engineering services required by this Agreement to be performed by contracting with a private engineering firm and seeks reimbursement for said services under this agreement, it is agreed as follows:

(A) The Municipality shall ensure that an engineering firm is obtained through an equitable selection process and that prescribed work is properly accomplished in a timely manner, at a just and reasonable cost.

(B) The Municipality, when procuring architectural, professional and engineering services, must adhere to Title 23 of the Code of Federal Regulations, Part 172. The Municipality shall

comply with the policies and standards for negotiated contracts as contained in the Federal-Aid Policy Guide, Part 172; said policies and standards being incorporated in this Agreement by reference (www.fhwa.dot.gov/legsregs/legislat).

(C) If a consultant is utilized for the preparation of the Plans, Specifications and Estimate (PS&E) package, the Department and Municipality must adhere to the North Carolina Department of Transportation Rules and Regulations for Major Professional or Specialized Services Contracts. This policy conforms to NCGS 143-64, Federal Acquisition Regulations Title 48 Subpart 31.1, 31.2, and Title 23 of the Code of Federal Regulations, Part 172. If the Department allows the Municipality to enter into a (third party) consultant agreement, the Municipality must submit said agreement to the Department for review and approval prior to execution of the agreement. The Department shall consult with the Municipality prior to the execution of any supplemental agreements with the consultant and during the development of the plans and specifications.

(D) The Municipality shall submit all professional services contract proposals to the Department for review and approval prior to execution of any professional services contract by the Municipality. In the event that the professional services contract proposal (engineering) exceeds \$30,000, a pre-negotiation audit must be requested from the Department's External Audit Branch.

(E) Reimbursement for construction administration costs cannot exceed fifteen percent (15%) of the actual construction contract cost. This applies to private engineering firms and/or work performed by the Municipality and/or the Department. The Municipality, and/or its agent, shall perform project administration in accordance with all Departmental and Federal policies and procedures.

3. All decisions related to the content of the plans and specifications for said signal system modernization/rehabilitation and expansion shall be made jointly by the Department and the Municipality. In the event a decision cannot be reached mutually, the Municipality agrees the Department will render a final decision regarding project elements that are part of the Department's system. The Department and the Municipality further agree that all written correspondence and submittals shall be first directed to the Department.

4. The Municipality shall, upon request, make available to the Department all accessible documentation for the existing signals and signal system. Such documentation shall include, but not be limited to: peak-hour traffic counts, mapping, all existing cable, street, cabinet and controller inventory, and all available signal designs which are not available within the Department.

5. The Municipality will designate personnel for use on an as-needed basis for the identification and location of existing facilities and for the technical review of materials submitted by the Department. If a consultant is used, the Department shall notify and invite appropriate representatives of the Municipality to attend all meetings during the consultant selection process, and solicit the Municipality's input during the design and review phase of the plan's preparation. These meetings will take place in either Wilmington or Raleigh.

6. The project shall be designed to install fiber optic communications cable along routes, which minimize construction costs. However, special consideration will be given to routes which provide sufficient utility clearances or are aesthetically context sensitive (e.g. historical, environmental, downtown, etc.). The Municipality shall cause to be adjusted, changed, or relocated, any utilities under franchise within the municipal corporate limits of Wilmington, to provide the proper utility clearance for the construction of the project. Such utility clearances shall be completed prior to the date of availability of the construction contract. Any utility work costs incurred that are not provided for under franchise agreements shall be an eligible project cost.

7. The Department shall be responsible for evaluating, preparing recommendations, and for the development of revised signal plans and electrical details to bring signal head displays into compliance with the current MUTCD and the North Carolina Supplement.

8. All construction of the project shall be contained within the existing right-of-way limits whenever possible. Any costs for additional right-of-way or easements required for the traffic signal system modernization/rehabilitation and expansion project shall be considered an eligible project cost.

9. The Department shall, enter into and execute Encroachment Agreements with CSX Transportation Railroad for the clear right-of-way for the installation of communications cable, over or

under existing railroad facilities as the case may be. Said agreements shall provide for the installation of communications cable by the Municipality, the Department, or either's authorized representative. Any cost incurred for encroachment agreements shall be an eligible project expense.

10. Prior to the award of contracts for the construction of the project, the Municipality shall have the right to terminate this agreement. It is understood by both parties, that if the Municipality elects to terminate this agreement at any point prior to letting of the construction contract, the Municipality shall reimburse the Department one hundred percent (100%) of the actual cost of all work performed by the Department. If the Department decides to terminate the project, the Department shall reimburse the Municipality one hundred percent (100%) of all costs expended by the Municipality and associated with said project. Reimbursement shall be made in one lump-sum payment within sixty (60) days of invoicing by the Department or the Municipality. The Department shall charge a late payment penalty and interest on any unpaid balance due in accordance with G. S. 147-86.23. In the event this agreement is terminated by the Municipality the Department shall have the right to deduct the actual cost of all work performed by the Department from any deposit to be the amount reimbursed to the Municipality.

11. The Department shall construct, or cause to be constructed, said project in accordance with the plans and specifications as prepared by the Department or its agent, and reviewed and approved by the Municipality. The Department shall be responsible for the overall administration of the project, including the advertising of the project for bids, the opening of bids, the awarding of the contract to the successful bidder, and the contract administration with input from the Municipality.

12. Construction of said project shall require mutual cooperation and shared participation by the Department and the Municipality. All decisions related to the construction of the project shall be made jointly by the Department and the Municipality. In the event a decision cannot be reached mutually, the Municipality agrees the Department will render a final decision regarding project elements that are on the State Highway System.

13. The Municipality agrees to procure the necessary central distributed traffic signal system software capable of running the Department's Statewide Oasis local controller software. For the

construction taking place at Municipal owned intersections not on the State system, the Municipality agrees to secure any required software licenses. Costs incurred by the Municipality for procurement of software and associated software licenses shall be eligible project costs.

14. The Department shall notify and invite appropriate representatives of the Municipality to attend all conferences regarding any phase of the project. The Municipality shall have full inspection access to all phases of construction and implementation. However, the Municipality agrees that communications relative to construction of the project by the Contractor shall be directed to the Department.

15. The Municipality shall designate personnel to assist with the design and inspection of the project, the technical review of material submittals, and for any review of computer software. The Municipality shall also assist in coordinating the testing for the physical takeover and control of the system. Labor costs incurred by the Municipality's City Traffic Engineer and Signal Systems Specialist are being reimbursed under the NCDOT Schedule D maintenance agreement. Any project-related cost incurred by the Municipality's personnel other than the City Traffic Engineer or Signal Systems Specialist shall be an eligible project cost.

16. The Municipality shall provide a location to house the traffic signal system control center and make any necessary building modifications at no cost to the Department. Reasonable access to the control center both during and after normal working hours shall be provided by the Municipality for both Department and Contractor personnel during periods of construction. Both parties understand that the Municipality, at no expense to the Department, shall continue to provide said location to house the control center.

17. The Municipality, excluding unforeseeable delays, shall be totally responsible for any reasonable (as determined by the Department) claims by the Contractor due to delays caused by the Municipality's failure to accomplish work in time for the Contractor to perform his work, including delays regarding utility clearance work for Municipally-owned utilities.

18. All existing signal equipment that is to be replaced by new equipment, and which was originally purchased by the Department shall remain the property of the Department. All existing signal equipment that is to be replaced by new equipment, but was originally purchased by the Municipality shall remain the property of the Municipality.

19. The Municipality shall secure all telephone drops that may be required on the project. The cost to secure these telephone drops is an eligible project cost.

20. The Department shall arrange for Municipal personnel the opportunity to attend any demonstrations of new equipment and any schools of instruction on the operation of the new signal system sponsored by the Contractor and/or his suppliers. The Municipality will assist the Department in the review and approval of all technical submissions and of a training program for signal system personnel to be provided by the Department's Contractor for the physical operation of the system. Costs incurred by the Department and the Municipality personnel to attend approved equipment demonstrations and schools of instruction on the operation of the signal system shall be an eligible project cost.

21. The Municipality shall participate in the estimated cost of the project up to the amount of \$5,000,000. The Department shall participate in the estimated cost of the project up to the amount of \$5,000,000. The estimated cost of the Wilmington Computerized Traffic Signal System, Project U-5017, is \$9,300,000. Based on the estimated cost, the Municipality shall electronically transfer the amount of \$4,300,000 to the Department by September 1, 2008. The Municipality has further agreed to fund up to an additional amount of \$700,000 for a total participation amount of \$5,000,000 if the project requires the additional funding. The project will not be advertised for project letting if said payment is not received from the Municipality. The Department shall utilize the funds to accelerate the construction schedule for the project and shall make an effort to award the project in Federal Fiscal Year (FFY) 09. The Department's cost share for preliminary engineering shall not exceed an amount of \$900,000.

22. The Department shall reimburse the Municipality for one hundred percent (100%) of the approved eligible costs for services, including professional engineering services, contract administration, plan review, construction inspection, and system testing that are performed by the Municipality while

assisting the Department under these terms of this Agreement. Reimbursement to the Municipality shall be subject to the policies and procedures contained in Federal-Aid Policy Guide Part 140, Subpart G, and Federal-Aid Policy Guide Part 172, which is being incorporated into this Agreement by reference (www.fhwa.dot.gov/legisregs/legislat.html). Said reimbursement shall also be subject to the Department being reimbursed by the Federal Highway Administration, which is to participate in the eligible costs of the project, subject to compliance with all applicable federal policy and procedural rules and regulations.

A. The Municipality will bill the Department on a quarterly basis for eligible project costs by submitting an itemized invoice to the Department's 3rd Division Engineer. Proper supporting documentation shall accompany each invoice as may be required by the Department.

B. Reimbursement to the Municipality for all invoices submitted shall be made upon approval of each invoice by the Department and the Financial Management Division of the Department.

C. If the Municipality enters into a professional service contract, reimbursement for contract work will be made on the basis of contract unit prices in the contract and any approved supplemental agreement.

D. Construction contract administration will be reimbursed as provided in Provision 2 E and Provision 15 of this Agreement.

E. The Municipality agrees that it shall bear all costs of any item for which it is unable to substantiate actual costs or any costs which have been deemed ineligible due to actions of the Municipality.

F. All invoices must be submitted within one (1) year of completion and acceptance of the project by the Department. Any invoices submitted after this time will not be eligible for reimbursement.

G. The Municipality shall be responsible for adhering to applicable administrative requirements of 49 CFR Part 18 (www.fhwa.dot.gov/legisregs/legislat.html) and Office of Management and Budget (OMB) Circular A-102 (www.whitehouse.gov/omb/circulars). If the work is performed by Municipal force account, said invoices shall show a summary of labor, labor additives, equipment,

materials and other qualifying costs in conformance with the standards for allowable costs as set forth in OMB Circular A-87 (www.whitehouse.gov/omb/circulars). Reimbursement shall be based on actual costs incurred with the exception of equipment owned by the Municipality. Reimbursement for rates of equipment owned by the Municipality cannot exceed the Department's rates in effect for the time period in which the work is performed. If the work is performed by a contractor, said invoices shall show the contract cost.

H. In accordance with OMB Circular A-133, *Audits of States, Local Governments and Non-Profit Organizations* (www.whitehouse.gov/omb/circulars/a133/a133.html) dated June 27, 2003 and the Federal Single Audit Act Amendments of 1996, the Municipality shall arrange for an independent financial and compliance audit of its fiscal operations. The Municipality shall furnish the Department with a copy of the independent annual audit report within thirty (30) days of completion of the report, but not later than nine (9) months after the Municipality's fiscal year ends.

I. Any costs incurred by the Municipality prior to written notification by the Department to proceed with the work shall not be eligible for reimbursement.

J. Failure on the part of the Municipality to comply with any of the provisions will be grounds for the Department to terminate its obligation to reimburse the Municipality for the eligible costs of the project.

K. The Municipality shall be responsible for one hundred (100%) percent of all cost for items included in the project plans and specification which, in the opinion of the Department, is for the convenience of the Municipality and not needed for the successful operation of the computerized traffic signal system.

23. The design of the project may include additional signal system enhancements (e.g., dynamic message signs, Municipality-owned fiber optic cable, etc.), and additional ITS capabilities. The Municipality will provide 100% funding for the design and construction costs to accommodate any of these additional features in the project, and will provide 100% funding for the redesign costs if these features are not included in the construction of the project.

24. The Municipality shall be responsible for one hundred percent (100%) of all costs of all items of work in which the Federal Highway Administration fails to participate due to non-compliance by the Municipality. The Municipality agrees that, if the Federal Highway Administration should not participate in certain costs because of noncompliance with Federal and/or State regulations, it will reimburse the Department for such costs caused by actions of the Municipality. Reimbursement shall be made by the Municipality to the Department within sixty (60) days of invoicing by the Department. A late payment penalty and interest shall be charged on any unpaid balance due in accordance with G.S. 147-86.23.

25. The Municipality shall maintain all books; documents, papers, accounting records, and such other evidence as may be appropriate to substantiate costs incurred under this Agreement. Further, the Municipality shall make such materials available at its office at all reasonable times during the contract period, and for five (5) years from the date of final payment under this Agreement, for inspection and audit by the Department's Fiscal Section. The Department reserves the right to deduct monies from the Municipality's Powell Bill Fund if determined by the FHWA, that costs are not in compliance and was an ineligible project expense.

26. In the event the Municipality fails for any reason to pay the Department in accordance with the provisions for payment hereinabove provided, North Carolina General Statute 136-41.3 authorizes the Department to withhold so much of the Municipality's share of funds allocated to said Municipality by North Carolina General Statute, Section 136-41.1, until such time as the Department has received payment in full.

27. The Municipality, and/or its agent, shall comply with the following federal policies: (a) Conflict of Interest; (b) Equal Employment Opportunity; and (c) Title VI – Civil Rights Act of 1964.

28. The Municipality, and/or its agent, shall also comply with the following federal policy: Disadvantaged Business Enterprises (DBE) as defined in 49 CFR Part 26.

Appendix E.1 - DISADVANTAGED BUSINESS ENTERPRISES (Race and Gender Neutral)
DISADVANTAGED BUSINESS ENTERPRISE

12-16-05_R

POLICY

It is the policy of the North Carolina Department of Transportation that Disadvantaged Business Enterprises shall have the opportunity to participate in the performance of contracts financed in whole or in part by Federal Funds in order to create a level playing field.

The Firm is also encouraged to give every opportunity to allow DBE participation in Supplemental Agreements.

OBLIGATION

The Firm, subcontractor, and sub-recipient shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Firm shall carry out applicable requirements of 49 CFR 26 in the award and administration of federally assisted contracts. Failure by the Firm to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy, as the Department deems necessary.

GOALS

Even though specific DBE goals are not required to be established for this project the Firm shall report the anticipated utilization of DBE's during the completion of the project or executed task orders as defined in the LISTING OF DBE SUBCONTRACTORS below.

The Firm shall exercise all necessary and reasonable steps to ensure that Disadvantaged Business Enterprises participate up to the level submitted in the Firms Letter of Interest (LOI) or project proposal.

LISTING OF DBE SUBCONTRACTORS

All Firms, at the time the LOI or project proposal is submitted, must also submit a listing of DBE participation on the appropriate form (or facsimile thereof) contained elsewhere in this proposal in order for the LOI or project proposal to be considered responsive. Firms must indicate the total dollar value of DBE participation for the contract. In the event the Firm has no DBE participation, it is still required to indicate this on the forms by entering the word or number zero. Blank forms will not be deemed to represent zero participation. LOI OR PROJECT PROPOSALS SUBMITTED WHICH DO NOT HAVE DBE PARTICIPATION INDICATED ON THE APPROPRIATE FORM WILL NOT BE READ PUBLICLY DURING THE OPENING OF LOI OR PROJECT PROPOSALS. The Department will not consider these LOI or project proposals for award and they will be returned to the Firm. Firms have the option of submitting their DBE participation in an abbreviated format as required in Paragraph A below, or the Firm may submit their DBE participation in the additional detail required by Paragraph B below. In the event the Firm elects to submit DBE participation in accordance with Paragraph A and is selected, that Firm must deliver to the Department no later than 12:00 noon of the fourteenth day following the opening of LOI or project proposals, a detailed DBE submittal as required by Paragraph B below.

Only those DBE Firms with current certification by the Department will be considered acceptable for listing in the Firm submittal of DBE participation.

A. The Firm shall indicate on the form for listing of DBE subcontractors contained elsewhere in this proposal the following required information:

REQUIRED INFORMATION

- (1) The name(s) of DBE Firms committed to participate in the contract

(2) The Federal Tax ID of DBE Firms committed to participate in the contract

(3) The description of the Service or Item to be performed and/or provided by each DBE Firm; and

(4) The anticipated utilization of each DBE based on planned efforts in dollars.

Failure to indicate the required information on the specified form will cause the LOI or project proposal to be considered nonresponsive and it may be rejected.

B. In lieu of submitting the information required by (A) above, the Firm may submit the detailed information below along with the LOI or project proposal form.

REQUIRED INFORMATION

(1) The name(s) of DBE Firms committed to participate in the contract

(2) The Federal Tax ID of DBE Firms committed to participate in the contract

(3) The Contract Item Numbers and Contract Item Descriptions and agreed upon unit prices of work to be performed by each DBE Firm; and

(4) The total dollar amount to be paid to each DBE based on agreed upon unit prices.

Failure to indicate the required information on the specified form will cause the LOI or project proposal to be considered nonresponsive and it may be rejected.

The Firm is required to submit written documentation of the Firm's commitment to use a DBE subcontractor and written confirmation from each DBE, listed in the proposal form, indicating their participation in the contract.

The Department will not allow any substitutions, deletions, or other alterations to the listing of Firms committed for DBE participation and/or the respective listed contract item numbers after the opening of the LOI or proposal. The Department will not allow adjustments to total dollar amount of DBE participation after the opening of LOI or project proposals that would result in the DBE participation being less than the anticipated utilization. The only exceptions to the requirements of this paragraph will be: (1) to allow for replacement of a DBE Firm that had been decertified after opening of LOI or project proposals, and (2) to allow alteration of the listed contract item numbers subject to the Firm submitting sufficient documentation to verify an obvious error in the initial submittal.

DBE DIRECTORY

Firms can access a list of Disadvantaged Business Enterprises (DBE) which have been certified as such by the North Carolina Department of Transportation at the following NCDOT web site: <http://apps.dot.state.nc.us/constructionunit/directory/>. Only those DBE Firms with current certification may be listed in the proposal form.

The listing of an individual Firm in the Department's directory shall not be construed as an endorsement of the Firms' capability to perform certain work.

REPLACEMENT OF DBEs

If any DBE Subcontractor submitted on the form for listing of DBE Subcontractors, contained elsewhere in this proposal form, is terminated or fails to complete its work on the contract for any reason, it is the Department's policy that the Contractor shall take all necessary, reasonable steps to replace the DBE Subcontractor with another DBE Subcontractor to perform at least the same amount of work of the contract as the DBE that was terminated.

Decertification

If a Prime Firm has listed a DBE Firm in its LOI or project proposal submitted and that DBE Subcontractor is subsequently decertified by the Department, then the Department will not require the Prime Firm to solicit replacement DBE participation equal to the remaining work to be performed by the decertified Firm. The participation equal to the remaining work performed by the decertified Firm will count toward the contract utilization but may not be counted toward the overall program goal.

DEFINITIONS

For purposes of this provision the following definitions will apply:

(1) Socially and economically disadvantaged individuals means a person who has a net worth of \$750,000.00 or less and is a citizen or lawful permanent resident of the United States and who is:

- (a) A Black American
- (b) A Hispanic American
- (c) A Subcontinent Asian American
- (d) A Native American
- (e) An Asian-Pacific American
- (f) A Woman

(g) Members of other groups, or other individuals found to be economically and socially disadvantaged by the Small Business Administration under Section 8(d) of the Small Business Act, as amended (15 U.S.C. 637(d)).

(h) Members of other groups, or other individuals found to be economically and socially disadvantaged by the N. C. Department of Transportation under the Criteria for Disadvantaged Business Enterprises as published by the Department.

(2) Disadvantaged Business Enterprise (DBE) means a for-profit small business concern.

(a) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation in which 51 percent of the stock is owned by one or more such individuals; and

(b) Whose management and daily business operation are controlled by one or more of the socially and economically disadvantaged individuals who own it,

COUNTING DBE PARTICIPATION TOWARD MEETING THE DBE UTILIZATION

(1) If a Firm is determined to be an eligible DBE Firm and certified by the Department, the total dollar value of the participation by the DBE will be counted toward the utilization. The total dollar value of participation by a certified DBE will be based upon the value of work actually performed by the DBE and the actual payments to DBE Firms by the Firm.

(2) When a DBE performs as a participant in a joint venture, the Firm may count toward its DBE utilization a portion of the total value of participation with the DBE in the joint venture, that portion of the total dollar value being a distinct clearly defined portion of work that the DBE performs with its forces.

(3) (a) The Firm may count toward its DBE utilization only expenditures to DBEs that perform a commercially useful function in the work of a contract. A DBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing, and supervising the work involved. To determine whether a DBE is performing a commercially useful function, the Department will evaluate the amount of work subcontracted, industry practices, whether the amount the Firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

(b) Consistent with standard industry practices, a DBE may enter into subcontracts. Work that a DBE subcontracts to another DBE Firm may be counted toward the contract utilization. Work that a DBE subcontracts to a non-DBE Firm does not count toward the contract utilization. If a DBE Firm or Subcontractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the DBE shall be presumed not to be performing a commercially useful function. The Department's decision on the rebuttal of this presumption is subject to review by the Federal Highway Administration but is not administratively appealable to USDOT.

(4) A Firm may count toward its DBE utilization 60 percent of its expenditures for materials and supplies required to complete the contract and obtained from DBE regular dealer and 100 percent of such expenditures to a DBE manufacturer.

(a) For purposes of this provision, a manufacturer is a Firm that operates or maintains a factory or establishment that produces on the premises the materials or supplies obtained by the Firm.

(b) For purposes of this provision, a regular dealer is a Firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials or supplies required for the performance of the contract are bought, kept in stock, and regularly sold to the public in the usual course of business. To be a regular dealer, the Firm must engage in, as its principal business and in its own name, the purchase and sale of the products in question. A regular dealer in such bulk items as steel, cement, gravel, stone, and petroleum products need not keep such products in stock, if it owns or operates distribution equipment. Brokers and packagers shall not be regarded as manufacturers or regular dealers within the meaning of this section.

(5) A Firm may count toward its DBE utilization the following expenditures to DBE Firms that are not manufacturers or regular dealers:

- (a) The fees or commissions charged by a DBE Firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE utilization, provided the fees or commissions are determined to be reasonable and not excessive as compared with fees and commissions customarily allowed for similar services.
- (b) The fees or commissions charged for assistance in the procurement of the materials and supplies, or for transportation charges for the delivery of materials or supplies required on a job site (but not the cost of the materials and supplies themselves), toward DBE utilization, provided the fees are not from a manufacturer or regular dealer and provided the fees are determined to be reasonable and not excessive as compared with fees customarily allowed for similar services.

REPORTS

All requests for subcontracts involving DBE subcontractors shall be accompanied by a certification executed by both the Prime Firm and the DBE subcontractor attesting to the agreed upon unit prices and extensions for the affected contract items. This document shall be on the Department's Form RS-2, or in lieu of using the Department's Form, copies of the actual executed agreement between the Prime Firm and the DBE subcontractor may be submitted. In any event, the Department reserves the right to require copies of actual subcontract agreements involving DBE Subcontractors.

The RS-2 certification forms may be obtained from the Department's Engineer, or Contract Administrator.

These certifications shall be considered a part of the project records, and consequently will be subject to penalties under Federal Law associated with falsifications of records related to projects.

REPORTING DISADVANTAGED BUSINESS ENTERPRISE PARTICIPATION

When payments are made to Disadvantaged Business Enterprise Firms, including material suppliers, Firms at all levels (prime, subcontractor, or second tier subcontractor) shall provide the Engineer or Contract Administrator with an accounting of said payments. This accounting shall be furnished the Engineer or Contract Administrator for any given month by the end of the following month. Failure to submit this information accordingly may result in (1) withholding of money due in the next partial pay estimate; or (2) removal of an approved Firm from the prequalified bidders list or the removal of other entities from the approved subcontractors list. The accounting shall list for each payment made to a Disadvantaged Business Enterprise Firm the following:

DOT Project Number
 Payer Firm Name and Federal Taxpayer ID
 Receiving Subcontractor or Material Supplier and Federal Taxpayer ID
 Amount of Payment
 Date of Payment

This document shall be on the Department's DBE Subcontractor Payment Information Form.

A responsible fiscal officer of the payee Firm, subcontractor, or second tier subcontractor who can attest to the date and amounts of the payments shall certify that the accounting is correct. A copy of an acceptable report may be obtained from the Engineer or Contract Administrator.

29. It is the policy of the Department not to enter into any agreement with another party that has been debarred by any government agency (Federal or State). The Municipality certifies, by signature of this agreement, that neither it nor its agents or contractors are presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation in this transaction by any Federal or State Department or Agency and that it will not enter into agreements with any entity that is debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation in this transaction.

30. The Municipality is solely responsible for all agreements, contracts, and work orders entered into or issued by the Municipality for this project. The Department shall not be held liable, by the Municipality, for any expenses or obligations incurred for the project except those specifically eligible for the funds and obligations as approved by the Department under the terms of this Agreement. The Department shall not reimburse the Municipality any costs that exceed the total federal funding at any time.

31. To the extent permitted by law, the Municipality will indemnify and hold harmless the Department, FHWA, and the State of North Carolina, their respective officers, directors, principals, employees, agents, successors, and assigns from and against any and all claims for damage and/or liability in connection with the negligent acts or omissions of the Municipality in Project activities performed in or around any Municipality facilities pursuant to this Agreement including construction of the Project. By entering into this Agreement, the Department does not assume any responsibility for any damages or claims for damages, which may be initiated by third parties.

32. By the date of completion of the project, the Municipality and the Department agree to enter into separate Municipal Maintenance Agreements for the sharing of future costs for the operation and maintenance of the central facility and for the system hardware on the state highway system.

33. The Municipality shall maintain staffing sufficient to provide for the proper maintenance and operation of the completed improvements. The Municipality shall agree to make available for future

training all the system's operating staff for any state or FHWA sponsored courses or workshops related to the enhancement of the Computerized Signal System both at the hardware and software level.

34. Upon completion of construction, the Municipality shall maintain and operate the centralized signal system in accordance with North Carolina General Statutes, the Department's current policies and guidelines, and all-local codes and ordinances. Subject to the terms of the Municipal Maintenance Agreements, if in the opinion of the Department, the Municipality does not maintain the signal system in accordance with the specified criteria, the Department shall have the right to enter into a separate maintenance agreement with a private contractor and deduct the cost of said maintenance from the Municipality's funds allocated under G.S. 136-41.1 and Municipal Maintenance Agreements Schedule C and D. Notwithstanding the foregoing, this Agreement is not intended to amend any existing Municipal Maintenance Agreement between the parties.

35. Failure on the part of the Municipality to comply with any of these provisions will be grounds for the Department to terminate participation in the costs of the project.

36. All terms and conditions of this Agreement are dependent upon, and, subject to the allocation of funds for the purpose set forth in the Agreement and the Agreement shall automatically terminate if funds cease to be available.

IT IS UNDERSTOOD AND AGREED that the approval of the project by the Department is subject to the conditions of this Agreement and that no expenditure of funds on the part of the Department will be made until the terms of this Agreement have been complied with on the part of the Municipality.

IN WITNESS WHEREOF, this Agreement has been executed the day and year heretofore set out, in triplicate, on the part of the Department and the Municipality by authority duly given, as evidenced by the attached certified copy of Resolution, Ordinance or Charter Provision, as the case may be.

L.S.
ATTEST

CITY OF WILMINGTON

BY: _____

BY: _____

TITLE: _____

TITLE: _____

DATE: _____

MUNICIPAL SEAL

This instrument has been pre-audited
in the manner required by the Local
Government Budget and Fiscal Control
Act.

Municipal Finance Officer

Federal Tax Identification Number

City of Wilmington

Remittance Address:
City of Wilmington

DEPARTMENT OF TRANSPORTATION

BY: _____
STATE HIGHWAY ADMINISTRATOR

DATE: _____

APPROVED AS TO EXECUTION:

BY: _____
ASSISTANT ATTORNEY GENERAL

EXHIBIT A

This exhibit includes the following provisions for the installation of additional fiber optic cable in conjunction with Project U-5017:

1. The Department shall, at the request of the Municipality, include the planning and installation of additional fiber optic cable and associated hardware in the project plans prepared by the Department for Project U-5017. The Department shall design and perform all work in accordance with Departmental standards, specifications, policies, and procedures.
2. The Municipality shall, at no expense or liability whatsoever to the Department provide and or acquire any needed right of way and/or construction easements required for the installation of the additional fiber optic cable. Acquisition of right of way and/or easements shall be made in accordance with Departmental policies and procedures.
3. The Municipality shall, at no expense to the Department, relocate and adjust all utilities in conflict with the installation of the additional fiber optic cable. Relocation of said utilities shall be performed in a manner satisfactory to and in conformance with rules and regulations of the Department. The Municipality shall make every effort to promptly relocate said utilities in order that the Department will not be delayed in the construction of the project.
4. The Municipality shall reimburse the Department one hundred percent (100%) of the actual cost of said work performed by the contractor in the installation of the additional fiber optic cables. The Municipality shall reimburse the Department for said costs as follows:
 - (A) The Department, on a quarterly basis, shall submit an itemized invoice along with supporting documentation to the Municipality for actual costs incurred for the installation of the additional fiber optic cables and associated hardware. Administrative expenses relating to salaries of Department employees shall not be reimbursable by the Municipality.
 - (B) Reimbursements to the Department shall be made by the Municipality within sixty (60) days of said invoice.
 - (C) If the Municipality does not pay said invoice within sixty (60) days of the date of the invoice, the Department shall charge a late payment penalty and interest on any unpaid balance due in accordance with G.S. 147-86.23.
 - (D) Any cost incurred due to additional utility work (betterment) requested by the Municipality after award of the construction contract, shall be solely the responsibility of the Municipality. The Municipality shall reimburse the Department 100% of the additional utility cost.
5. In the event the Municipality fails for any reason to pay the Department in accordance

with the provisions for payment hereinabove provided, North Carolina General Statute 136-41.3 authorizes the Department to withhold so much of the Municipality's share of funds allocated to said Municipality by North Carolina General Statute, Section 136-41.1, until such time as the Department has received payment in full.

6. Upon the satisfactory completion for installation of the additional fiber optic cable, the Municipality shall assume normal maintenance operations for said cable. Upon completion of the installation and satisfactory inspection of the installation by Municipal forces, the Municipality shall release the Department from any and all claims for damages in connection with installation of the fiber optic cable; and, further, the Municipality shall release the Department of any future responsibility for the cost of maintenance to said cable. Said releases shall be deemed to be given by the Municipality upon completion for the installation of the fiber optic cable and its acceptance by the Department from its contractor unless the Municipality notifies the Department, in writing, to the contrary prior to the Department's acceptance of the project.

(A) If at any time the Department shall require the removal of or changes in the location of the Municipal owned encroaching facilities which are being relocated at the Municipality's expense, the Municipality binds itself, its successors and assigns, to promptly remove or alter said facilities, in order to conform to the said requirement, without any cost to the Department.

7. It is understood by all parties to this Agreement that the additional fiber optic cable covered under this Agreement shall be owned and can be used in any capacity the Municipality deems necessary, including leasing of individual fiber(s), bandwidth, etc., to any governmental or non-governmental entity.